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8                   **UNITED STATES DISTRICT COURT**  
9                   **WESTERN DISTRICT OF WASHINGTON**  
10                  **AT TACOMA**

11 DAVID L. BARRETT,

12                  Plaintiff,

13                  v.

14 CAROLYN W. COLVIN, Acting  
15                  Commissioner of Social Security,

16                  Defendant.

17                  CASE NO. 3:16-CV-05394-DWC

18                  ORDER ON PLAINTIFF'S  
19                  COMPLAINT

20 Plaintiff filed this action, pursuant to 42 U.S.C § 405(g), seeking judicial review of the  
21 denial of Plaintiff's applications for Disability Insurance Benefits ("DIB") and Supplemental  
22 Security Income ("SSI") benefits. The parties have consented to proceed before a United States  
23 Magistrate Judge. *See* 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Magistrate Judge Rule  
24 MJR 13. *See also* Consent to Proceed before a United States Magistrate Judge, Dkt. 6.

25 After reviewing the record, the Court concludes the Administrative Law Judge ("ALJ")  
26 erred by failing to find Plaintiff's sleep apnea to be a severe impairment at Step Two of the  
27 sequential evaluation. The ALJ also erred by failing to properly evaluate the opinion of an  
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1 examining physician. Therefore, this matter is reversed and remanded, pursuant to sentence four  
 2 of 42 U.S.C. § 405(g), for further proceedings.

3 **PROCEDURAL& FACTUAL HISTORY**

4 On May 13, 2013, Plaintiff filed applications for DIB and SSI. *See* Dkt. 11,  
 5 Administrative Record (“AR”) 253-263. Plaintiff alleges he became disabled on May 30, 2009,  
 6 due to back pain and a learning disorder. *See* AR 253, 296. Plaintiff’s applications were denied  
 7 upon initial administrative review and on reconsideration. *See* AR 113-14, 143-44. A hearing  
 8 was held before an ALJ on October 29, 2014, at which Plaintiff, represented by counsel,  
 9 appeared and testified. *See* AR 74.

10 On December 24, 2014, the ALJ found Plaintiff was not disabled within the meaning of  
 11 Sections 216(i), 223(d), and 1614(a)(3)(A) of the Social Security Act. AR 64. Plaintiff’s request  
 12 for review of the ALJ’s decision was denied by the Appeals Council on April 20, 2016, making  
 13 that decision the final decision of the Commissioner of Social Security (the “Commissioner”).  
 14 *See* AR 1, 20 C.F.R. § 404.981, § 416.1481. On May 24, 2016, Plaintiff filed a complaint in this  
 15 Court seeking judicial review of the Commissioner’s final decision.

16 Plaintiff argues the denial of benefits should be reversed and remanded for further  
 17 proceedings, because the ALJ: 1) failed to find Plaintiff’s obstructive sleep apnea to be a severe  
 18 impairment at Step Two of the sequential evaluation; 2) improperly evaluated the opinion of an  
 19 examining physician; 3) improperly discounted the testimony of a lay witness; 4) failed to offer  
 20 clear and convincing reasons for discounting Plaintiff’s subjective symptom testimony; and 5)  
 21 failed to properly evaluate whether Plaintiff could perform other work existing in significant  
 22 numbers in the national economy. Dkt. 17, pp. 1-2.

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**STANDARD OF REVIEW**

Under 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits only if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting Davis v. Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)).

**DISCUSSION****I. Whether the ALJ Erred by Failing to Consider Plaintiff's Obstructive Sleep Apnea to be a Severe Impairment at Step Two of the Sequential Evaluation.**

At Step Two of the sequential evaluation, the ALJ must determine if a claimant has a "severe medically determinable physical or mental impairment." 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii) (2015). *See also Smolen v. Chater*, 80 F.3d 1273, 1289-90 (9th Cir. 1996) (internal citation omitted). Impairments must result "from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques." 20 C.F.R. § 416.908 (2010). A medically determinable impairment is considered "severe" if it "significantly limits [a claimant's] physical or mental ability to do basic work activities . . ." 20 C.F.R. §§ 404.1520(a)(4)(iii) & (c), 416.920(a)(4)(iii) & (c); *see also* SSR 96-3p, 1996 WL 374181 \*1. Basic work activities are those "abilities and aptitudes necessary to do most jobs," including, for example, "walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling; capacities for seeing, hearing and speaking; understanding, carrying out, and remembering simple instructions; use of judgment; responding

1 appropriately to supervision, co-workers and usual work situations; and dealing with changes in  
 2 a routine work setting.” 20 C.F.R. § 404.1521(b), § 416.921(b); SSR 85- 28, 1985 WL 56856 \*3.

3 Defendant concedes the ALJ failed to consider Plaintiff’s obstructive sleep apnea to be a  
 4 severe impairment—or even a medically determinable impairment—at Step Two of the  
 5 sequential evaluation. Dkt. 18, pp. 2-3. However, Defendant argues any such error was harmless,  
 6 as the ALJ resolved Step Two in Plaintiff’s favor, and proceeded on through the other steps of  
 7 the sequential evaluation. *Id.*

8 An error is harmless if “there remains substantial evidence supporting the ALJ’s decision  
 9 and the error does not negate the validity of the ALJ’s ultimate conclusion.” *Molina v. Astrue*,  
 10 674 F.3d 1104, 1115 (9th Cir. 2012) (*quoting Batson v. Comm’r of Soc. Sec. Admin*, 359 F.3d  
 11 1190, 1197 (9th Cir. 2004)). Thus, if a claimant prevails at Step Two and the ALJ considers all  
 12 impairments—regardless of severity—in the subsequent steps, an ALJ’s failure to consider an  
 13 impairment “severe” is harmless. *See Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007). *See*  
 14 *also Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007), *Garcia v. Commissioner of Soc. Sec.*, 587  
 15 Fed.Appx. 367, 370 (9th Cir. 2014).

16 Here, however, the ALJ failed to consider sleep apnea in the subsequent steps of the  
 17 sequential evaluation. Indeed, despite the fact Plaintiff testified to impairments due to sleep  
 18 apnea during the hearing, and the medical records include detailed evaluations of Plaintiff’s sleep  
 19 apnea, the ALJ fails to mention sleep apnea at all in the written decision. AR 52-64, 87-88, 411-  
 20 12. Further, the fact the ALJ restricted Plaintiff to light work in the RFC does not necessarily  
 21 mean the ALJ has adequately addressed Plaintiff’s obstructive sleep apnea. Plaintiff’s sleep  
 22 apnea causes “severe sleep disruption due to respiratory arousals with periodic limb  
 23 movements.” AR 412. Plaintiff testified to reduced sleep (four to six hours per night), a recurring  
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1 need to take naps throughout the day, and only limited relief from his BiPAP device. AR 87-88.  
 2 While a restriction to light work might very well address many of the limitations associated with  
 3 reduced sleep, the two concepts are not coterminous; the ALJ was required to consider the  
 4 potential effects of Plaintiff's fatigue on his residual functional capacity. *See Reddick v. Chater*,  
 5 157 F.3d 715, 724 (9th Cir. 1998) (noting the ALJ erred by failing to consider the impact of  
 6 Plaintiff's chronic fatigue syndrome on his residual functional capacity, despite the fact the ALJ  
 7 limited Plaintiff to light work due to orthopedic issues).

8 Because the ALJ failed to consider Plaintiff's obstructive sleep apnea to be a severe  
 9 impairment at Step Two of the sequential evaluation, the ALJ committed harmful error requiring  
 10 remand.

11       II.     Whether the ALJ Properly Evaluated the Medical Opinion Evidence.

12       A. Standard

13       The ALJ must provide "clear and convincing" reasons for rejecting the uncontradicted  
 14 opinion of either a treating or examining physician or psychologist. *Lester v. Chater*, 81 F.3d  
 15 821, 830 (9th Cir. 1996) (*citing Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v.*  
 16 *Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). However, "[i]n order to discount the opinion of an  
 17 examining physician in favor of the opinion of a nonexamining medical advisor, the ALJ must  
 18 set forth specific, *legitimate* reasons that are supported by substantial evidence in the record."  
 19 *Nguyen v. Chater*, 100 F.3d 1462, 1466 (9th Cir. 1996) (*citing Lester*, 81 F.3d at 831). The ALJ  
 20 can accomplish this by "setting out a detailed and thorough summary of the facts and conflicting  
 21 clinical evidence, stating his interpretation thereof, and making findings." *Reddick v. Chater*, 157  
 22 F.3d 715, 725 (9th Cir. 1998) (*citing Magallanes*, 881 F.2d at 751). In addition, the ALJ must  
 23 explain why the ALJ's own interpretations, rather than those of the doctors, are correct. *Reddick*,  
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1 157 F.3d at 725 (*citing Embrey*, 849 F.2d at 421-22). The ALJ “may not reject ‘significant  
2 probative evidence’ without explanation.” *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995)  
3 (*quoting Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (*quoting Cotter v. Harris*, 642  
4 F.2d 700, 706-07 (3d Cir. 1981))). The “ALJ’s written decision must state reasons for  
5 disregarding [such] evidence.” *Flores*, 49 F.3d at 571.

6 **B. Application of Standard**

7 Dr. Mark Heilbrunn, M.D. conducted a physical examination of Plaintiff on July 15,  
8 2013. AR 373. On examination, Dr. Heilbrunn noted Plaintiff had a wide-based and short-strided  
9 gait, lumbar midline and paraspinous tenderness with radiating pain. AR 376. Dr. Heilbrunn  
10 noted Plaintiff had a positive straight leg raise test in a supine position, and noted positive  
11 lordosis. AR 376. Dr. Heilbrunn also documented bilateral tenderness over Plaintiff’s lateral  
12 epicondyles, and noted positive Tinel’s, Phalen’s and Finkelstein’s tests. AR 376. Plaintiff  
13 presented with reduced grip strength bilaterally, and decreased sensation in the median nerve  
14 distribution of his palms. AR 377. Finally, Dr. Heilbrunn documented reduced range of motion  
15 in Plaintiff’s back and hips. AR 377.

16 Dr. Heilbrunn diagnosed Plaintiff with lumbar degenerative disc disease, bilateral carpal  
17 tunnel syndrome, obesity, and partial sacralization and spina bifida of L6, among other  
18 impairments. AR 378. As a result of these impairments, Dr. Heilbrunn opined Plaintiff would  
19 have reduced range of motion in his lower back, would be unable to stoop, would potentially  
20 have some limitations in handling, fingering, and feeling, would be able to lift and carry up to 20  
21 pounds on an occasional basis, could sit no more than four to five hours in an eight-hour work  
22 day, could stand and/or walk no more than 15 minutes at a time, and for no more than three to  
23 four hours in an eight-hour workday, and would have limited use of his forearms. AR 378-79.  
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1       The ALJ noted Dr. Heilbrunn's evaluation was consistent with Dr. Heilbrunn's findings  
 2 and gave it some, but not full, weight. AR 62. However, the ALJ did not meaningfully articulate  
 3 why she declined to give Dr. Heilbrunn's opinion less than full weight. The only explanation the  
 4 ALJ offered was the following:

5       The claimant's most recent evaluation revealed good strength, good range of  
 6 motion, no trouble with ambulation, and moderate pain relief with over-the-  
 7 counter medication [AR 512-15]. The claimant also did not report any carpal  
 8 tunnel symptoms.

9       AR 62. This does not constitute a specific and legitimate reason for giving less than full weight  
 10 to the opinion of an examining physician. The ALJ must explain why his opinion, rather than the  
 11 doctors, is correct, and he must do so by "setting out a detailed and thorough summary of the  
 12 facts and conflicting clinical evidence, stating his interpretation thereof, and making findings."  
 13 *Reddick*, 157 F.3d at 725. The ALJ's summary of a subsequent medical report, without any  
 14 explanation as to why this subsequent evidence warrants giving Dr. Heilbrunn's opinion less  
 15 than full weight, fails to meet this standard.<sup>1</sup> Indeed, the ALJ's failure to articulate her reasoning  
 16 frustrates this Court's ability to perform meaningful judicial review. *Pinto v. Massanari*, 249  
 17 F.3d 840, 847 (9th Cir. 2001).

18       Defendant also argues the ALJ offered the competing opinion of the non-examining state  
 19 agency medical consultant, Dr. Robert Bernadez-Fu, M.D., as evidence which was inconsistent  
 20 with Dr. Heilbrunn's opinion. However, the ALJ did not cite to Dr. Bernadez-Fu's opinion as a  
 21 basis for giving Dr. Heilbrunn's opinion less than full weight. See AR 62. This Court will not

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22       <sup>1</sup> To the extent this subsequent medical record bears any relevance to Dr. Heilbrunn's  
 23 opinion, the Court notes the ALJ's summary of the record is not entirely accurate. The treatment  
 24 notes the AJL references actually document reduced range of motion and diminished sensation in  
 Plaintiff's lower back and groin. AR 511-16. The treatment notes also reflect Plaintiff has been  
 referred to a neurosurgeon for epidural steroid injections. AR 511.

1 engage in a *post-hoc* rationalization in order to intuit what the ALJ might have been thinking  
2 when she declined to give full weight to Dr. Heilbrunn's opinion. *See Bray v. Comm'r, Soc. Sec.*  
3 Admin., 554 F.3d 1219, 1225-26 (9th Cir. 2009).

Because the ALJ failed to articulate a specific and legitimate reason, supported by substantial evidence, for giving less than full weight to Dr. Heilbrunn's opinion, the ALJ erred. Plaintiff argues Dr. Heilbrunn's opinion should be credited as true on remand. However, Plaintiff has not demonstrated Dr. Heilbrunn's opinion is uncontradicted, only that the ALJ failed to offer specific and legitimate reasons to discount Dr. Heilbrunn's opinion. While the existence of Dr. Bernadez-Fu's opinion is not, by itself, substantial evidence to discount Dr. Heilbrunn's opinion, the Court notes it conflicts with the more restrictive opinion of Dr. Heilbrunn. The ALJ is responsible for resolving conflicts and ambiguities in the medical evidence, not the Court. See *Morgan v. Comm'r, Soc. Sec. Admin.*, 169 F.3d 595, 603 (9th Cir. 1999) Thus, the ALJ should reevaluate Dr. Heilbrunn's opinion on remand.

### **III. Other Assignments of Error.**

In addition to the foregoing, Plaintiff also argues the ALJ erred in evaluating the lay witness testimony, in discounting Plaintiff's subjective symptom testimony, and in finding Plaintiff was capable of performing other jobs existing in significant numbers in the national economy. However, in light of the ALJ's error at Step Two and in evaluating the medical opinion evidence, the ALJ will necessarily need to reconsider these findings on remand.

## **CONCLUSION**

Based on the foregoing reasons, the Court finds the ALJ committed harmful error by failing to consider Plaintiff's obstructive sleep apnea to be a severe medically determinable impairment at Step Two, and by failing to properly evaluate Dr. Heilbrunn's opinion. Therefore,

1 the Court orders this matter be reversed and remanded pursuant to sentence four of 42 U.S.C. §  
2 405(g). On remand, the ALJ should evaluate whether Plaintiff has the severe impairment of  
3 obstructive sleep apnea, re-evaluate the medical opinion evidence, re-evaluate Plaintiff's  
4 subjective symptom testimony, re-evaluate Plaintiff's residual functional capacity, and proceed  
5 on to Step Four and/or Step Five of the sequential evaluation as appropriate. The ALJ should  
6 also develop the record as needed. Judgment should be for Plaintiff and the case should be  
7 closed.

8 Dated this 23rd day of December, 2016.

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11 David W. Christel  
United States Magistrate Judge  
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